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# In the Supreme Court of the United States

OCTOBER TERM, A. D. 1944

No. 698.....

IN RE WARNER COAL CORPORATION, DEBTOR.

WARNER COAL CORPORATION,

*Petitioner,*

VS.

COSTANZO TRANSPORTATION COMPANY, et al.,

*Respondents.*

## PETITION FOR WRIT OF HABEAS CORPUS

To the United States Circuit Court of Appeals  
For the Fourth Circuit, and

BRIEF IN SUPPORT OF PETITION.

ROBERT J. BULKLEY,

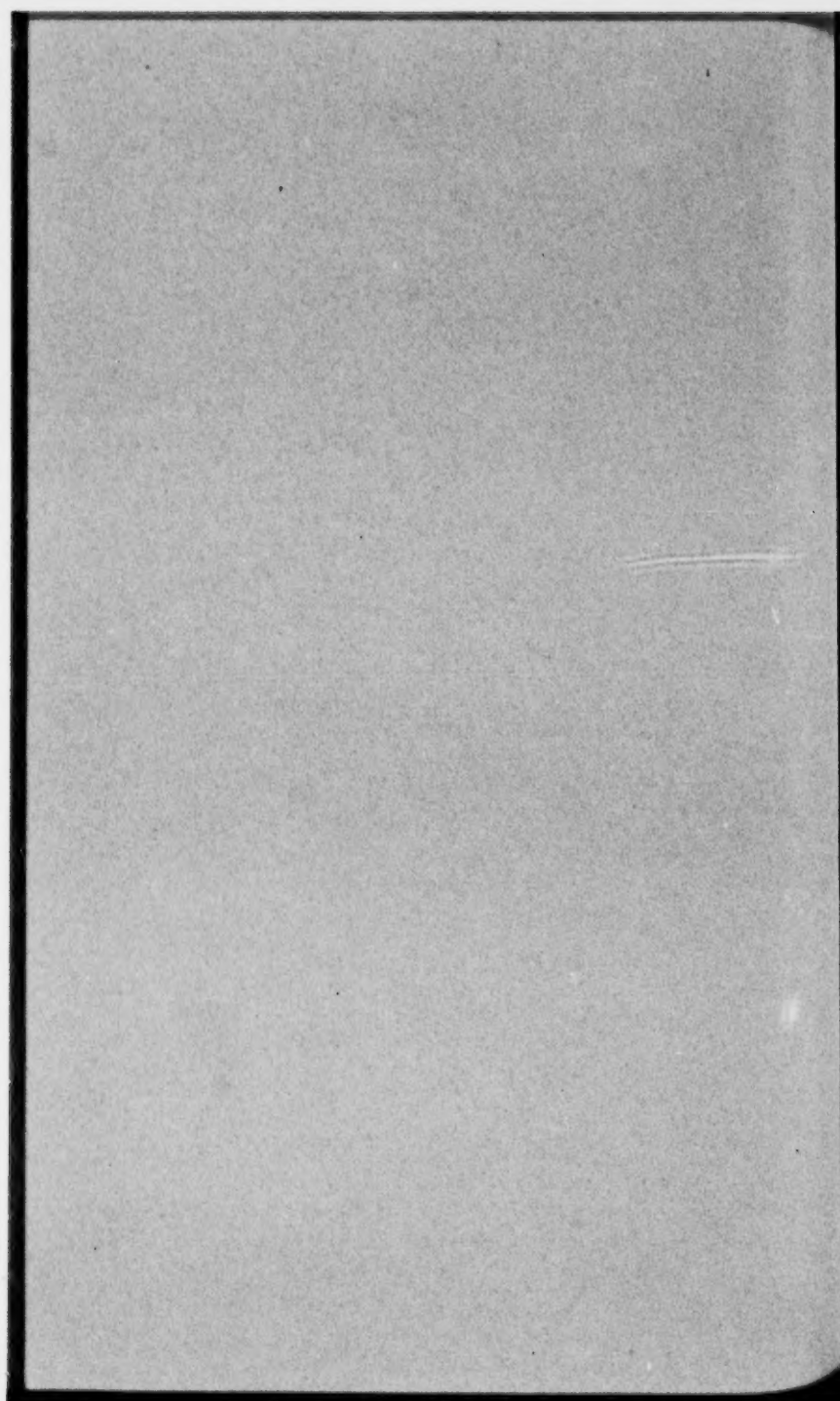
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COSTANZO TRANSPORTATION COMPANY, *et al.*,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI.

*To the Honorable, The Chief Justice and the Associate Justices of the United States:*

Petitioner, Warner Coal Corporation, hereby petitions for the issuance of a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit, whose judgment was made final on October 2, 1944, when it denied a rehearing of its decision of August 4, 1944, affirming the judgment below.

## STATEMENT OF THE MATTER INVOLVED.

This is a controversy arising out of involuntary bankruptcy proceedings brought against Warner Coal Corporation, a West Virginia corporation, in the United States District Court for the Northern District of West Virginia at Wheeling. Petitioning creditors together with Ohio Edison Company, an intervening creditor, now are respondents. They contended in the District Court that Warner Coal Corporation, while insolvent, committed an act of bankruptcy by its failure to satisfy, within thirty

days, an attachment lien obtained by Ohio Edison Company on June 17, 1943, in the Common Pleas Court of Cuyahoga County, Ohio (R. 5).

Three other alleged acts of bankruptcy which were asserted are not pertinent here because of the rulings of the courts below. The creditors' petition was filed October 9, 1943 (R. 3), all but four months after the date of the alleged acts of bankruptcy in June, 1943. This was at the time when Warner Coal Corporation had just completed an extensive program of rehabilitating its mines (R. 41, 46).

Warner Coal Corporation answered the involuntary petition against it and denied its insolvency (R. 9, 11). It also demanded a jury trial (R. 16). During the trial, the District Court granted motions made by petitioning creditors to exclude from consideration in determining solvency, all evidence of the value of the Coal Company's leasehold and of its mining machinery and equipment acquired by bill of sale from lessors (R. 17, 29).

The motions were based on the contention that in the event debtor was adjudicated a bankrupt, lessors would then have the right to cancel the lease, regain possession of the mines and seize the equipment therein. If this should occur, the properties would not be available to satisfy creditors' claims. The Coal Company proffered testimony that the fair value of its leasehold was \$61,457.87 and of its machinery was \$292,400.32 and that it was solvent. By the terms of its lease the Coal Company had the right to use a very large amount of other machinery with which the mines were equipped. This other machinery was not claimed as an asset and no testimony was offered by any party as to its value.

Warner Coal Corporation had leased, for twenty years commencing September 1, 1942, two large coal mines, one known as Richland and the other as Costanzo, located on the Ohio River just at the outskirts of Wheeling (R. 114). By bill of sale, Warner Coal Corporation acquired title to

certain specified machinery and equipment located in the Costanzo mine (R. 123). The leasehold and the machinery represented over 90% of the debtor's assets (R. 129).

The trial court directed the jury to return a verdict that Warner Coal Corporation was insolvent and that it had committed an act of bankruptcy in failing within thirty days, to satisfy an attachment lien obtained by Ohio Edison Co. (R. 18). The verdict was so returned by the jury (R. 20). The court then adjudicated Warner Coal Corporation a bankrupt (R. 21). The Circuit Court of Appeals affirmed the judgment of the District Court (R. 186).

#### **JURISDICTION INVOKED.**

The jurisdiction of this Court to grant the Writ is invoked under 240 (a) of the Judicial Code, 28 U. S. C. A., Sec. 347 (a). The judgment of the U. S. Circuit Court of Appeals for the Fourth Circuit affirming the decision below was rendered August 4, 1944 (R. 187), and was made final by the denial of the Petition for Renewing on October 2, 1944 (R. 217). This petition is filed within the statutory period.

#### **OPINIONS BELOW.**

The opinion below of the District Court was not published. It appears in the Record at page 18. The opinion of the Circuit Court of Appeals is published in the advance sheets of the Federal Reporter, 144 F. (2d) 589, and appears in the Record at page 187.

#### **THE QUESTIONS PRESENTED.**

1. In determining solvency in an involuntary bankruptcy, does the debtor have a right to submit to the jury evidence of the fair value of the debtor's twenty-year leasehold, not in default, and of its machinery and equipment, notwithstanding a provision of the lease that, if the debtor be adjudicated bankrupt, lessor would have the

option to cancel the lease and repossess the premises, including machinery and equipment?

2. In determining solvency in an involuntary bankruptcy, involving a debtor company, which, at the time of the alleged act of bankruptcy, was in possession of and using its leasehold and machinery in connection with its mining business, does the debtor have a right to submit to the jury evidence of the fair value to a going concern of its twenty-year leasehold, not in default, and of its machinery and equipment, notwithstanding a provision of the lease that, if the debtor be adjudicated bankrupt, lessor would have the option to cancel the lease and repossess the premises, including the machinery and equipment?

3. In the review of an involuntary bankruptcy case, with facts as presented in the preceding question, may the Appellate Court substitute itself for the jury and consider the proffered evidence of fair value to a going concern which the trial court excluded from the jury, and on such consideration fix the value of debtor's property at the amount of cash paid for it, rather than in accordance with the proffered evidence of its fair value to a going concern?

#### **REASONS FOR ALLOWANCE OF THE WRIT.**

This case presents a conflict with the decisions of two other Circuit Courts involving fundamental questions concerning the all important issue of solvency in an involuntary bankruptcy proceeding. There is no conflicting testimony as to the value of debtor's property. The District Court held that by reason of the terms of the lease, the debtor's most important assets, in the event of adjudication of bankruptcy, would not be readily available to creditors and therefore could not be considered as property in determining solvency (R. 17 and Clause 17 of lease R. 117).

The Fourth Circuit Court of Appeals affirmed the judgment of the District Court.



### Conflict with Fifth Circuit.

The decision in this case is directly in conflict with the ruling of the Fifth Circuit Court of Appeals in the case of *Lasswell v. Stein-Block Co., et al.*, 93 F. (2d) 322, decided in 1937. In that case, the Fifth Circuit Court held that the word "property" in Sec. 1 (19) defining insolvency is used in a broad sense and is not limited to property available to pay the bankrupt's debts.

The Bankruptcy Act specifically defines insolvency:

Sec. 1 (19) of the Bankruptcy Act, 11 U. S. C. A. 1 (19):

"A person shall be deemed insolvent within the provisions of this Act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not at a fair valuation be sufficient in amount to pay his debts."

In the *Lasswell* case, the appellant contended that debtor's homestead should not be included in determining solvency, because in Texas a homestead cannot be sold by the owner, if a married man, (as the debtor was), without the consent of his wife, and was therefore not available to creditors. The Fifth Circuit Court specifically overruled that contention and held that:

"Conceding the nature of a community homestead in Texas and the husband's lack of power to alienate it without the consent of his wife, we hold that such exempted homestead should be included in computing solvency since there is no indication of Congressional intent to exclude any property other than that conveyed or concealed to hinder or delay creditors."

**Conflict with Sixth Circuit.**

The decision of the Fourth Circuit Court is also in conflict with the ruling of the Sixth Circuit Court of Appeals in the case of *Re Nathanson Bros. Co.*, 64 F. (2d) 912, decided in 1933. We quote the third syllabus from the *Nathanson* case:

“If business of alleged bankrupt is, in fact, being conducted at time of alleged bankruptcy, then items of property constituting its assets must be considered as property of ‘going concern’ for purpose of determining whether alleged bankrupt is solvent.”

On September 1, 1942, Warner Coal Corporation commenced the operation of its mines under the terms of its lease (R. 26, 27). The Coal Company continued to operate its properties and made substantial improvements therein right up to October 9, 1943, the date on which involuntary bankruptcy proceedings were commenced (R. 3, 46, 130, 134). The District Court promptly appointed an operating receiver who took charge of the property and resumed the mining and sale of coal. When the District Court adjudicated the Coal Company a bankrupt, the operating receivership was terminated and the same individual, A. Spates Brady, was appointed receiver for Warner Coal Corporation, a bankrupt. He is presently operating the mining properties.

The Coal Company was conducting its business at the time of the alleged act of bankruptcy and was therefore entitled to have its assets considered as property of a going concern for the purpose of determining solvency. The judgment of the Fourth Circuit Court affirmed the District Court, in excluding all testimony concerning the fair value to a going concern of debtor's chief assets, namely its leasehold and mining equipment (R. 17, 186).

**Effect of Judgment.**

If the judgments of the lower courts in this case represent the law, then businessmen must make a drastic departure from generally accepted standards in estimating the worth of their capital assets. No longer will it be safe for an accountant to certify that a going concern has any value in its leasehold or any value in machinery which it owns outright if, under the terms of the lease, an adjudication of bankruptcy would give the lessor the option to cancel the lease and repossess the premises, including machinery and equipment located therein.

The judgment of the Fourth Circuit Court in this case is directly in conflict with the decisions of the Fifth and Sixth Circuit Courts in the cases just mentioned. The Supreme Court has not passed upon these questions.

**PRAYER FOR RELIEF.**

WHEREFORE, the petitioner, by its counsel, prays the issuance of a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit, to the end that the judgment may be reversed and for such other relief as to the Court may seem fit.

ROBERT J. BULKLEY,

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